88-1343 (1)

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1988

CHARLES F. DARLINGTON

Petitioner

against

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Janet Cunard
Morosco and Cunard
Attorneys for Petitioner
99 Court Street
White Plains, New York 10601
(914) 997 9606

73p

ISSUES PRESENTED

The defendant was convicted of filing a false document (18 USC 1001) on the uncorroborated testimony of a single "accomplice", a person who admitted his intent to defraud the government.

> If the accomplice cannot "pass muster" under the test of Valdez v. United States, 244 US 432 (1917), can his uncorroborated testimony alone be enough to convict?
>
> Should the "two witness" rule, applied in perjury prosecutions be applied to a "false statement" prosecution?
>
> Does a conviction based solely upon such evidence provide a basis for a rational trier of fact to find proof beyond a reasonable doubt as mandated by Jackson v. Virginia, 443 US 307 (1979)?

The trial judge, as trier of the fact, found that the defendant "prove(d) his good character and reputation at the bar and in the community for truth and

veracity" and "showed himself to be a pillar of the community and fine family man".

> Does the failure of the trier of the fact to consider those factors on the issue of guilt or innocence violate Edgington v. United States, 164 US 361 (1896)? Under the circumstances of the instant case does defendant's good character create a reasonable doubt?

The trial judge ordered production of "statements", taken by government agents from witnesses. The agents took "statements", as defined by 18 USC 3500 (e) (2) from witnesses and then at some unknown later time, destroyed those "statements" and wrote reports based upon them, reports which did not accurately reflect the "statements", and which were not "adopted" by the witnesses. The government was not able to comply with the direction of the trial court.

> Does the destruction of those "statements", in violation of the "Jencks Act" and the INS regulations mandate the imposition of sanctions? The issue presented was reserved by this Court in Palermo v. United States, 360 US 343 (1959).
>
> Does such intentional destruction violate the defendant's Sixth Amendment rights? The issue was reserved by this Court in United States v. Augenblick, 393 US 348 (1969).

The trial court ordered production of certain statements pursuant to a specific Brady request, and the documents were not produced by the government. Related documents, for which a general request was made, were also not produced. The documents go directly to the issue of guilt or innocence. Had the defendant been aware of the latter document his defense would probably have been different, and based upon the documents in question, the outcome of the trial would probably have been different.

Did the failure to produce those documents deprive the defendant of a fair trial and due process?

The trial court did not rule on the issue of whether sanctions should be imposed under the "Jencks Act" (18 USC 3500 [d]) for failure to produce the "statements" as ordered. The Court of Appeals found that the trial judge had so ruled, against the defendant. The trial judge, when the issue was again presented to him, found that the Court of Appeals had ruled on the issue so that he could not.

Does the failure of the courts to rule on a substantial issue, the trial court and appellate court each wrongfully finding that the other had, deprive the defendant of a fair trial, due process and the right to appeal?

"While every criminal conviction is important to the defendant, there is a special poignancy and a corresponding responsibility on reviewing judges when,

as here, the defendants have been men of blameless lives and respected members of a learned profession," (United States v. Simon, 425 F2d 796 (2 Cir 1970), cert den 397 US 1006

> Does the failure of the Court of Appeals to consider the appeal on the proper facts deprive defendant of his statutory right to appeal?

PARTIES TO PROCEEDINGS

1. Indictment Number 86 Cr 779 (USDCSDNY) charged Charles F. Darlington III, Arlene Cureton, Denise Oliver, Patricia Parris, Angelo Elusma and Jean Louissaint.

Cureton, Oliver and Parris admitted to arranging marriages, entered into agreements and entered pleas of guilty prior to trial.

Louissaint was severed, when he received defective notice of trial, and was tried separately.

Elusma was tried jointly with defendant and was convicted. He appealed to the Court of Appeals and the judgment was affirmed.

2. Indictment Number 86 Cr 1017 (USDCSDNY) charged Charles F. Darlington III, Clyde Day, Michelle

Griffin and Bonita Macintosh.

Griffin admitted to arranging marriages, entered into an agreement and entered a plea of guilty prior to trial. MacIntosh was a fugitive at the time of trial.

Day was severed and tried separately. The indictment against defendant was consolidated with 86 Cr 779 for trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
CASE REPORTED	v
JURISDICTION	v
AUTHORITIES	vi
INITIAL JURISDICTION	viii
FACTS	1
THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION	6
Accomplices	6
Defendant's Good Character	16
Motive	17
Two Witness Rule	24
Repugnant Verdict	26
JENCKS AND BRADY VIOLATIONS REQUIRE REVERSAL	29
CUMULATIVE ERROR REQUIRES REVERSAL	52
CONCLUSION	55
APPENDIX	

TABLE OF AUTHORITIES

CASES

Arizona v. Youngblood, __US__ 57 LW 4013 (1988)	44
Brady v. Maryland, 373 US 83 (1963)	44
Caminetti v. United States, 242 US 470 (1917)	19
Campbell v. United States, 373 US 487 (1963)	38
Coppedge v. United States, 369 US 438 (1962)	53
Darland v. United States, 626 F2d 1235 (5 Cir 1980)	16, 17
Dunn v. United States, 284 US 390 (1932)	6
Edgington v. United States, 164 US 361 (1896)	16
Hammer v. United States, 271 US 620 (1926)	24
Holmgren v. United States, 217 US 509 (1909)	19
Jackson v. Virginia, 443 US 307 (1979)	6
Krulewitch v. United States, 336 US 440 (1948)	20
Nanfito v. United States, 20 F2d 376 (8 Cir 1927)	17

Palermo v. United States, 360 US 343 (1959) 41

United States v. Augenblick, 393 US 348 (1969) 30

United States v. Bagley, 473 US 667 (1985) 50

United States v. Berry, 627 F2d 193 (9 Cir 1980), cert den 449 US 1113 52

United States v. Borello, 766 2d 46 (2 Cir 1985) 53

United States v. Burke, 781 F2d 1234 (7Cir 1985) 17

United States v. Caceres, 440 US 741 (1979) 42

United States v. Carrasco, 537 F2d 372 (9Cir 1976) 39

United States v. Diogo, 320 F2d 898, (2 Cir 1963) 25

United States v. Edwards, 631 F2d 1049 (2 Cir 1980) 52

United States v. Elusma, 849 F2d 76 (2Cir 1988) 53

United States v. Gold, 237 F2d 764 (DC Cir 1956) 25

United States v. Harrison, 524 F2d 421 (DC Cir 1975) 37

United States v. Hibler, 463 F2d 455 (9 Cir 1972) 20

United States v. Jones, 763 F2d 518 (2 Cir 1985), cert den 474 US 981 53

United States v. Lee, 506 F2d 111 (DC Cir 1976), cert den 421 US 1002 24

United States v. Louissaint, __FS__ (USDCSDNY) 8

United States v. Marchioso, 344 F2d 653 (2 Cir 1965) 25

United States v. Miranda, 526 F2d 1319 (2 Cir 1975), cert den 429 US 821 39

United States v. Petrillo, 821 F2d 85 (2 Cir 1987) 31

United States v. Quick, 128 F2d 832 (3 Clr 1942) 17

United States v. Sanchez, 635 F2d 47 (2 Cir 1980) 40

United States v. Simon, 425 F2d 796 (2Cir 1970), cert den 397 US 1006 56

United States v. Wallace, 848 F2d 1464 (9 Cir 1988) 52

Valdez v. United States, 244 US 432 (1917) 7

Re Winship, 397 US 358 (1970) 6

CONSTITUTION

FIFTH AMENDMENT 44

SIXTH AMENDMENT 30, 38

STATUTES

18 USC 1001 1, 24, 26

18 USC 1621 25

18 USC 1622 26, 27

18 USC 3500 29, 31, 34, 39, 40, 43

OTHER

INS EXAMINATIONS HANDBOOK 29, 42

CASE REPORTED

The decision of the Court of Appeals is reported:

United States v. Elusma, 849 F2d 76 (2 Cir 1988)

JURISDICTION

Judgment was entered December 3, 1987.

Judgment was affirmed on June 10, 1988.

A petition for rehearing with a suggestion for a hearing en banc was denied on September 27, 1988

A motion to the trial court to resettle an order of that court dated October 14, 1987, denying a Rule 33 motion, was denied on October 12, 1988.

A petition for rehearing on a record supplemented by the October 12, 1988, proceedings was denied on November 15, 1988.

The statutory basis for jurisdiction is 28 USC 1254.

AUTHORITIES

FIFTH AMENDMENT

No person shall be...deprived of life, liberty, or property, without due process of law....

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to...be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor...

18 USC 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, ficticious or fraudulent statements or representations, or makes or uses ony false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 USC 1621 Perjury generally

Whoever-...

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does

not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 USC 1622 Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 USC 3500 Demands for production of statements and reports of witnesses

(b) After a witness called by the United States has testified on direct examination, the court shall on motion of the defendant order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified...

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness and the trial shall proceed...

(e) The term "statement" as used in subsections (b), (c), and (d) of

this section in relation to any witness called by the United States, means-...

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

INS Examinations Handbook

In criminal prosectuions, the Jencks Act (18 USC 3500) generally requires that a statement in the possession of the United States which was made by a Government witness be produced after the witness' testimony and upon demand of the defense...

The remedy for violations of Jencks is suppression of the witness' testimony. The following steps should be taken to avoid jeopardizing cases:

1. All original notes of witness and/or defendant interviews must be retained;

2. All original notes made during surveillance operations that the investigator may later be required to testify about must be retained; and

3. All original drafts of reports concerning interviews and surveillance operations that the investigator may later be required to testify about if they are the investigator's first written record of the interview or surveillance.

INITIAL JURISDICTION

The indictment charged violation of 18 USC 1001 and 18 USC 371.

FACTS

As found by the trier of fact, the defendant, a practicing attorney for over twenty years, "prove(d) his good character and reputation at the bar and in the community for truth and veracity" (A163). He "had no motive to become part of a conspiracy to effectuate sham marriages for Haitian aliens as charged" (A171), and "he didn't do it for money" (A355). "The (trial) court agrees that (he) acted out of character in what (he) did here" (A 355). The defendant has always maintained that he never knowingly filed any false documents and that he is innocent of any wrongdoing.

The defendant was convicted of three counts[1] of violating 18 USC 1001

---

1. After a hung jury, the trial judge heard the case on the original record.

The defendant was acquitted on two charges of conspiracy and twenty-three other substantive counts.

in that he submitted I-130 forms to INS stating that each of three citizen/alien couples lived together when they did not. The sole evidence on the issues of whether the parties lived together and whether the defendant knew they did not, if they did not, was the testimony of the individual citizen spouse[2]. Each received a "no prosecution" agreement for his cooperation and each showed himself to be a person of poor character with a motive to lie.

The three individuals, Andrew Parris, Albert Scott a/k/a Albert Thomas and Lisa Beechum each testified that he entered into a marriage[3] with a Haitian alien solely for money, though

---

2 The alien spouses were not even interviewed by the government (hearing 1/12/87, p.23)).

3. Parris was married in October, 1985, Scott (Thomas) in July, 1984 and Beechum in December, 1985.

none recalled the details of payment, so that the alien could get a green card and that he did not intend to and did not ever live with his spouse. Each was to be paid half the money at the time of marriage and the other half after the alien got his green card.

Parris testified to prior convictions for burglary, robbery and petit larceny. Beechum is a welfare recipient who changed her story each time she told it. Scott (Thomas) has, according to him, about seven convictions. Upon con- viction of a felony, each of the men, based upon his prior record, could an- ticipate a sentence of incarceration. They had no choice but to cooperate. Beechum's predicatment was quite differ- ent, admit a valid marriage and lose her welfare grant, at least in part, and be prosecuted for welfare fraud, or, be prosecuted for immigration fraud and

face a possible term of imprisonment or cooperate and not lose the welfare grant or face prosecution.

Admitted marriage arrangers, who entered into plea and no jail agreements in return for their cooperation, testified that they arranged the marriages and told the citizens that, while they did not have to live with their alien spouses, they should tell defendant that they were living together. They did not testify as to whether Parris, Scott (Thomas) or Beechum ever lived with his spouse or to what happened in defendant's office. They did testify that the citizens were to be paid half their fee at the time of marriage and the other half after the alien received his green card.

Though they would only get the second half of their money after their spouses got their green cards, Scott

(Thomas) and Beechum testified that they and their spouses each told defendant that they were living at different addresses and Parris that he never told defendant he was living with his spouse. Each attributed statements to defendant which would indicate that he knew that the spouses were not living together.

Defendant and his paralegal,[4] who was present at the Parris and Beechum interviews, testified at trial and denied that he had any information which would indicate that the marriages were other than valid. Defendant has always maintained his total innocence.

---

4 Janise Parris and her exhusband had been living apart for 16 months but had only been divorced for one. Thus, when Janise came into the office three days after her husband with a new spouse, the defendant's paralegal questioned her to make sure that she loved her new husband and that they were living together and received affirmative responses (SA 43-44).

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION

There was insufficient evidence from which a rational trier of fact could find proof beyond a reasonable doubt (Jackson v. Virginia, 443 US 307 [1979]). A conviction based upon less than proof beyond a reasonable doubt violates the due process clause of the Fifth Amendment (Re Winship, 397 US 358 [1970]).

(A) ACCOMPLICES

On each count, each of which must be considered as a separate indictment (Dunn v. United States, 284 US 390 [1932]), there was one witness, an "accomplice", against defendant and no evidence to corroborate or otherwise substantiate his testimony.

Each of those witnesses, (Scott [Thomas], Parris and Beechum) testified

that he entered into a marriage with an alien solely for money so that the alien could get a "green card" and that he had no intention of and never did live with his spouse. Each of the witnesses, by virtue of his own admission of an attempt to defraud the government is an "accomplice" (co-conspirator).

The testimony of an accomplice "is not to be summarily discarded but to be judged of by confirming or opposing circumstances as well as by his character and the influences that may invest him" (Valdez v. United States, 244 US 432 [1917]).

There are no circumstances confirming the story told by the citizen spouses and the circumstances oppose those stories.

Each witnesss married solely for money but could not recall the details of payment (Parris was paid $250

after the ceremony and $250 after the attorney (A41) or, as he told the agents, $300 after the wedding and $200 after the lawyer (A433); Thomas was paid $500 after the lawyer (A110) and, as he told the agents, $500 by the arranger when he asked for it and an additional $200 by his wife (A459), or, as he testified at the subsequent Louissaint trial, $500 after the lawyer and $50 from the arranger and the remainder from his wife (United States v. Louissaint 153-54); Beechum's husband went to the bank before (A67) or after (A145) the lawyer and she was paid after the lawyer (A75-76) or, as she told the agents, before the lawyer [A367]). Yet, each claimed to remember precisely what was said in defendant's office, but only insofar as it would involve defendant in wrongful conduct.

The defendant, and his para-

legal on the two occasions that she was present, denied that anything occurred during the interviews which would lead one to believe that the marriages were questionable.

The "arrangers" testified that they told each of the citizens to tell defendant that he and his spouse were living together[5]. The citizen spouses each denied having been given such instruction (A47, A82-83, A114). Each citizen claimed at trial that he did not tell the lawyer that he was living with his spouse, even though he would not get the second half of his money until after his spouse got a green card. (Beechum testified in the grand jury, the only one to so testify, that she had been instructed not to let the defendant

---

5. The trial judge found that relevant only on the conspiracy count (A 225).

"mislead" her and to make sure she and her husband wrote the same address [Ex. L, A145], instructions she denied on trial [A 82-83]). If one married solely for money, he would remember the details of payment and would not jeopardize any part of his payment by not following instructions.

Each witness professed to have an excellent recollection of what happened in defendant's office, insofar as it would involve him in wrongful conduct, yet each had a flawed recollection of basic details. Scott (Thomas) thinks that he mentioned to defendant that his name was Thomas but doesn't recall telling him either name (A112). Parris swore when he got his license that he lived at 311 So. 8th Ave., Mt Vernon (A121) and at trial that he lived, at the time of his marriage, at 60 Horton Ave., New Rochelle (A40). He

did not remember giving anybody his birth cerrificate (A58) but the original, issued May 1, 1967, was in the file.

Parris and Beechum and Scott (Thomas) each testified that he went with his spouse both to get the marriage license and to the defendant's office (A34,37; A65,69). The marriage license applications, which the defendant did not have until shortly before trial, showed that the spouses did not give consistent information. Parris' wife stated, when she got her license, that she was born January 25, 1958, was unemployed and had not been married before (A121), but at the intake, done four days later by defendant's paralegal, stated that she was born November 7, 1957, had been employed at the Coachman Hotel for two years and had previously been married to Delima Philus

(Ex. EE, 943). On December 2, 1985, Beechum's husband stated that he was born December 10, 1958 and worked at Beef Steak Charles (A116) but on December 3, 1985, stated to defendant's paralegal that he was born October 12, 1958 and had worked at Sears since April, 1985 (Ex. HH, ex 33, A118, A156, 985). Scott (Thomas) wife gave her wrong age on the license application (A125). The information was so basic that Parris, Beechum, and Scott (Thomas) either lied when they stated that they went both places with their spouse, or had no recollection of the events.

Beechum had no idea what happened. Beechum told the AUSA in July 1986, before the grand jury, that she makes a different capital "A" (her married name was Alincar) and didn't remember signing the I-130 (A81) or that she refused to sign it (A368), but at trial

it was her signature (A72). About the differences, she explained that "it was white" and she signed it (A75, A151), that she "did not sign no white sheet of paper" (A81). She further explained that she denied it was her signature because she "didn't remember signing a yellow sheet of paper" (A74-75) and "when he showed me that copy I told him that I did not sign no white sheet of paper. I signed a yellow one and a blue one" (A81).

Beechum was thoroughly confused about other aspects of the interview. She testified that her husband paid defendant $700. and did not get a receipt (A151) but exhibit 101 is a receipt given to her husband that day for a $200. payment. On December 2, 1985, she stated that she was born at Valhalla, New York (A116) but on December 3, 1985, she told defendant's paralegal

that she was born at New York, New York (A156). Based solely upon Beechum's incredible testimony about what happened in defendant's office, the trier of fact concluded, "While the usual difficulties which inure in the credibility of all of the prosecution witnesses are present with Ms. Beechum, this Court observed her and believes that she was essentially a credible and truthful witness, whose memory of the event is accurate" (A224-25), and found the defendant guilty.

The character of the witnesses is best shown by their utter contempt for the system. All three expressed their willingness to defraud the government in exchange for the payment of money. Scott (Thomas) and Parris have multiple convictions for crimes involving moral turpitude. Beechum repeatedly told different and contradictory

stories, at will, all the time swearing that she had a clear recollection of the events about which she testified. After her testimony, she gave an even clearer picture of her true character. As she left the witness stand, Beechum passed by defense counsel and uttered an obscenity at him (A95), or, as she told an agent, at the system (A95-96). She then approached a juror and "said it was funny or something and I (the juror) kept walking on " (525). Beechum described the encounter, "Beechum said to her, 'well what do you think'. And juror number two said to her, something along the lines of I think it is hilarious or something along those lines" (A94-95). At about the time those events were occuring, $64 was stolen from the juror's purse, a theft for which two other witnesses were later arrested.

B) DEFENDANT'S GOOD CHARACTER

As found by the trier of fact, the defendant "prove(d) his good character and reputation at the bar and in the community for truth and veracity" and "showed himself to be a pillar of the community and fine family man" (A163). An examination of the decision shows that that factor was not considered on the issue and guilt or innocence was determined solely upon an analysis of the testimony of the citizen witness. The defendant's good character, had it been properly considered, would have been sufficient, under the circumstances, to create a reasonable doubt (Edgington v. United States, 164 US 361 [1896]).

Good character, proven by a reputation for truth and veracity is relevent and must be considered when the crime charged is crimen falsi (Darland

v. United States, 626 F2d 1235 [5Cir 1980]). Proper consideration of such evidence is particularly important where the government's case is based entirely upon "testimony of self-confessed accomplices" (United States v. Quick, 128 F2d 832 [3 Cir 1942]), or even chiefly "upon the evidence of admitted accomplices" (Nanfito v. United States, 20 F2d 376 [8Cir 1927]).

> "The jurors are entitled to infer that a person with a solid professional reputation, and therefore with much to lose, is less likely to risk his career in a criminal escapade than is a person with no future in the legitimate world" (United States v. Burke, 781 F2d 1234 (7 Cir 1985).

C) MOTIVE

Each of the citizens had a motive to cooperate and testify against defendant. The men, based upon their prior criminal records, could expect incarceration upon a conviction of

fraud. If Beechum admitted a valid marriage, she would lose her welfare grant and face prosecution and if she did not cooperate, face prosecution based upon a fraudulent marriage. The only viable choice for each was to testify against the defendant in exchange for an agreement of no prosecution.

As found by the trier of fact, the defendant "had no motive to become part of a conspiracy to effectuate sham marriages for Haitian[6] aliens as charged" (A 171), "he didn't do it for money" (A355), and "his practice was far larger than his talent and support facilities could accommodate" (A171).

If the testimony of the accomplice (co-conspirator) is not to be summarily discarded based upon the Valdez

---

6. All Haitian cases, not just marriages, accounted for about 5% of the case load of the office (SA58).

analysis, corroboration should be required before consideration is given to it (Holmgren v. United States, 217 US 509 [1909]). There is no corroboration.

In Caminetti v. United States, 242 US 470, (1917), this Court reiterated the rule of Holmgren that it is "the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and torequire corroborating testimony before giving credence to such evidence", and then announced

> "While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." (at 495)

That statement, in a case where "there was substantial testimony tending to support the verdicts rendered", has been cited by many courts as standing for the proposition that a conviction can be had

on the uncorroborated testimony of accomplices (see e.g., Krulewitch v. United States, 336 US 440 [1948], Jackson, concurring).

> "It is important to note that the key word 'uncorroborated' was omitted from the last sentence in the above (Caminetti) quote" (United States v. Hibler, 463 F2d 455 [9 Cir 1972], Anderson concurring specially).

The injustice caused by basing a conviction solely upon the uncorroborated testimony of an accomplice is well illustrated by the Scott (Thomas) count.

The trier of fact found Scott (Thomas) "to be truthful and sufficiently detailed in his testimony. His demeanor was candid and his credibility was unshaken on cross-examination" (A191). Perhaps unshaken on cross-examination, but on another trial approximaterly two months later, he testified differently, and inconsistently.

His residency at the time in question is a good example.

At trial, he testified,

> "Q. Before you were imprisoned on your most recent conviction where were you living?
>
> A. In Mount Vernon, 70 Horton Avenue.
>
> Q. Where was that?
>
> A. New Rochelle.
>
> Q. How long were you living at that address?
>
> A. About five months, six months something like that" (A99).

His "rap" sheet shows that at the time of that arrest, on October 18, 1984, three months after his marriage, he gave his address as 145 South First Avenue, Mount Vernon, New York, an address he swore to before the Court Clerk at the time of conviction on that charge. At the Louissaint trial, he testified,

> "Q. Do you recall when that was (that you last saw your wife)?

> Q. What was the occasion of your meeting with her, on the day before your arrest?
>
> A. I was going to school up the hill from my house.
>
> Q. You just accidently bumped into her?
>
> A. I have to pass her house anyway".(Louissaint, 163)

His wife lived, according to Scott (Thomas), at 137 Fisher Avenue, White Plains, about 7 1/2 miles from New Rochelle.[7]

Scott (Thomas) swore on three different occasions that at the same time he lived at three different places, Mount Vernon, New Rochelle and White Plains.

As to whether he was told that he didn't have to live with his wife, Scott (Thomas) testified,

> "Q. Did he (Jean) tell you whether or not you have to live

---

7. White Plains is north of New Rochelle. There is a school up a hill about two blocks south of 137 Fisher Ave.

with Miss D'Haiti after you got married?

A. No, he did not.

Q. What did he say about that?

A. It never really came up." (A101)

At the Louissaint trial, he testified,

"Q. Did you discuss with Mr. Louissaint whether or not you had to live with Miss D'Haiti

A. I was told that I didn't have to live with her.

Q. Who told you that?

A. Jean."(Louissaint 144)

Scott (Thomas) also had different stories to tell about who was with him at different stages of the marriage process, and trip to defendants office.

Scott (Thomas) may have held up on cross-examination but nobody was aware of the fact that he would testify, just as surely, to different facts when asked the same questions two months later.

It is undoubtedly because of the knowledge that "when there is no corroboration, the problem of perjury looms large (with) the danger that an innocent person might be convicted solely on the perjurious fabrication of an alleged accomplice" (United States v. Lee, 506 F2d 111 [DC Cir 1976] cert den 421 US 1002) that the courts have fashioned rules of corroboration for certain situations.

D) TWO WITNESS RULE

Falsity is the "corpus delicti" of 18 USC 1001 as it is of perjury and subornation of perjury so the "general rule", "that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury" (Hammer v. United States, 271 US 620 (1926)), should apply (United

States v. Gold, 237 F2d 764 (DC Cir en banc 1956) rev oth gr 352 US 985; contra United States v. Marchioso, 344 F2d 653 [2 Cir 1965]).

> "False representations (under 18 USC 1001), like common law perjury require proof of actual falsity"
> (United States v. Diogo, 320 F2d 898 [2 Cir 1963])

The perjury and subornation of perjury statutes require proof of falsity and the additional element that the statement was under oath. The false statement statute requires proof of falsity and the additional element that the matter be within the jurisdiction of a department or agency of the government.

The documents in question were submitted to an agency of the government and contained a sworn statement by the petitioner (18 USC 1621 [2]) and a declaration by defendant that it "is based on all information of which I have any

knowledge". The document itself proved the additional elements under both false statement and perjury sections. The defendant could have been charged with subornation of perjury (18 USC 1622).

The common issue presented, under either a perjury or false statement charge, is the element of falsity. The only evidence on that issue is the uncorroborated testimony of a single witness. On a perjury prosecution, the "two witness" rule is invoked to prevent conviction; so must it be on a false statement prosecution.

E) REPUGNANT VERDICT

To hold otherwise creates an anomalous situation where the defendant could not be convicted of the lesser offense of perjury (maximum penalty 5 years and $2000.00 fine) because there was insufficient evidence of falsity,

but was convicted of the greater crime of submitting a false instrument (maximum penalty 5 years and $10,000 fine), which requires proof of the very same falsity.

There were two facts that had to be proven to prove the charges: a) the spouses did not live together and had no intention of doing so, and b) the defendant knew or should have known[8] that they did not. The only evidence on either issue was the uncorroborated testimony of a single accomplice (co-conspirator) of bad character who admitted his intent to defraud, all the time swearing that the incredible story that he told was true. The defendant, who "had no motive to become part of a conspiracy to effectuate sham marriages for Haitian aliens as charged" (A 171) and

---

8. The theory of "conscious avoidance" was applied to the Parris count.

who "prove(d) his good character and reputation at the bar and in the community for truth and veracity" (A163), and his paralegal both swore that the story told of wrongdoing in defendant's office was untrue.

There was no evidence upon which a "rational trier of fact could find guilt beyond a reasonable doubt". (Jackson v. Virginia, supra).

JENCKS AND BRADY VIOLATIONS REQUIRE REVERSAL

When they interviewed witnesses, the INS agents took notes which amounted to "statements" under 18 USC 3500(e)(2). At some later time the agents wrote "reports" and discarded the contemporaneously made "statements", an action which violated existing INS rules requiring that all notes and statements be retained,

> "All original notes of witness and/or defendant interviews must be retained" (SA 2)

and the "Jencks Act".

Upon request, the trial judge directed that all notes[9] of witness interviews be produced (the agents did not testify) but only one "statement"

---

9. The ruling by the trial court included not only "statements" but also "scratch notes" (710-11).

(which pertains to an acquittal count) was extant. As later stated by the trial judge, "the trial court ordered all that it could order" (SSA 12) "but the court can't require the performance of an impossible act, and if these papers don't exist, they can't be used" (SSA 10). The ruling by the trial judge which is tantamount to a holding that the agents deliberate and wrongful destruction of "statements" abridges the right of cross-examination, violates defendant's Sixth Amendment rights to compulsory process and to confront the witnesses against him (The issue of a Sixth Amendment violation was reserved by the Court in United States v. Augenblick, 393 US 348 [1969]). Sanctions mandated by the "Jencks Act" should have been imposed (18 USC 3500 [d]).

When the trial judge ordered

production, the government did not argue that they were not "Jencks Act" "statements" or otherwise not producible. The only response was that they had been routinely destroyed and could not be produced.

The Court of Appeals stated

> "We see no reason to disagree with Judge Brieant's finding of 'no violation of the Brady rule or Section 3500' Cf. United States v. Petrillo, 821 F 2d 85,88 (2Cir 1987)(trial court's rulings on withholding of allegedly exculpatory evidence given great deference)"

The trial court did not so hold. On the defendant's post conviction motion, he argued that statements from the alien spouses and handwriting analysis was newly discovered evidence. In denying the motion, the trial judge stated

> "When I say that, I'm speaking of marriage license applications, birth certificates,

> I-130 forms and similar matters. The defendant knew well in advance of trial and had copies of these documents, and the Court finds no violation of the Brady rule or Section 3500, of Title 18 in the course of this trial or at any pre-trial stage and the defendants cannot be heard to claim at this late date that their discovery of handwriting discrepancies if such there be, could not have been made earlier with the exercise of due diligence." (A57-58)

The defendant then made another motion to the trial court seeking a holding that it did not hold as stated by the Court of Appeals. The trial judge stated,

> "The Court: I think the Circuit Court understands the issue here. I think that this Court ordered it produced. It turned out it couldn't be produced. I don't know what else there is to do with this.
>
> Ms. Cunard: Your Honor, if it can't be produced it has been wrongfully destroyed in violation of both the agents own rules and case law and sanctions must be imposed.

> The Court: That's what you say, but the difficulty with that is it's, that's not what page 7 of the slip opinion says" (SSA 14).

The only ruling by the trial court was a direction to the government to produce, a direction with which it could not comply because the statements had been routinely destroyed.

The issue reserved by this Court in Campbell v. United States, supra, is squarely presented herein

> Whether "their destruction gives rise to sanctions under sub-section (d), or permits secondary evidence of their contents to be produced"

The reports made by the agents from the interview "statements" will not suffice as an alternative as they contained information supplied by the agents, not the witness, and were given to the witness to study for trial. Arlene Cureton, an arranger, testified that she had a copy of her grand jury

testimony and the agents' reports (170)[10] and used them to refresh her recollection,

> "I don't have a clear recollection of everything that took place, but I have papers to read what I want to find out"(169-70).

The witness was testifying from the agents' report[11], not her own recollection and was being cross-examined from that report, which contained the agents' imput of facts, not from her recollection of the facts as set forth in the statement that she initially made.

The one "statement" extant, (Levitha de Sousa [A475-78], an acquittal), shows that a lot of recollection

---

10 Erroneously referred to as statements, as all "statements" relating to her had been destroyed.

11. There is no indication that she "adopted or approved" (18 USC 3500 [e] [1]) the reports, only that she used them to learn.

refreshing was necessary. Ms. de Sousa first told the agents that she was married in the summer of 1985, when in fact she was married on the coldest day of January, 1986. As shown by the "statement", but not the report, she was shown and identified the marriage license with the correct dates before she mentioned any wintertime occurences.

It is impossible for the defendant to know what was contained in the original "statements", more specifically, those relating to Scott(Thomas), Parris and Beechum. That the reports do not accurately reflect what the witness said may be seen by an examination of the report relating to Theresia Rufus (an acquittal). The report dated July 28, 1986, states, "She and Thelusma went in with Darlington" (A438). Darlington is a name supplied by the agents and not

the witness. Rufus testified in the grand jury (SA 25-26), at trial (379) and at a subsequent trial (Louissaint, 172) that she did not remember the attorney's name and when the name Darlington was suggested to her in the grand jury, said she wasn't sure (SA 25-26). At trial she stated she did not see the attorney in the courtroom and doesn't remember what he looks like (379). (The fact that De Sousa was asked to identify a codefendant is set forth in the "statement" [A 475] but not the report [A 473]. There is no indication in any report that anyone was asked to identify a picture of defendant.) The agents' report has that degree of distortion about which the courts have expressed concern,

> "And certainly we cannot consider it beyond the bounds of possibility that a report be distorted because of overzealousness on the part of the

> agents preparing it" (United States v. Harrison, 524 F2d 421 [DC Cir 1975]).

Given a copy of the report which had information supplied by the agents and which was previously unknown to the witness, any witness could easily learn the information and testify to something that he did not know.

The real issue in the case was what happened in defendant's office and whether, based upon that, he knew or should have known, if it be the case, that the marriages were fraudulent. The government's whole case rested on the supposed recollection of one witness and the defendant's only means of impeachment was to show a lack of recollection. A defendant's attorney cannot effectively cross-examine a witness about his recollection of events when the facts relating to the events have been provided by someone else, in this

case the INS agents, and given to the witness to learn. If the defendant's attorney only has access to that instructional tool, i.e. the report, not the witness' original statement containing his true recollection of events, the attorney is in effect cross-examining the nonwitness agent who has no knowledge of the facts, and not the witness. The defendant was denied the right of confrontation guaranteed by the Sixth Amendment.

A showing of inconsistency is not a prerequisite to the right of a defendant to discovery of "Jencks Act" statements (Campbell v. United States, 373 US 487 [1963]). The trial court ordered production and the government did not object but simply answered that the materials sought had been routinely destroyed (SA 294, SSA 11). The government's position was later stated, "and your Honor, I represent as an officer of

the court that every single piece of 3500 material, whether it be my interview notes or whatever the agents maintained, has been turned over and all testimony or other prior statements of any of the witnesses has been turned over" (A294). The key word is maintained. All notes and statements were not turned over, only those which were not destroyed by the government (see: United States v. Miranda, 526 F2d 1319 [2 Cir 1975], cert den 429 US 821). The defendant's rights under the "Jencks Act" cannot be sum- marily denied.

Inability to produce "Jencks Act" statements because they have been intentionally destroyed is tantamount to a refusal to produce (United States v. Carrasco, 537 F2d 372 [9Cir 1976]),

> "We have made clear that (the Jencks Act) also imposes a duty on the government to preserve such statements ... Obviously such a duty is necessary to

> prevent wholesale avoidance of the government's obligations by routine destruction of statements made to government agents". (United States v. Sanchez, 635 F2d 47 (2 Cir 1980)

and the trial "court shall strike from the record testimony of the witness" (18 USC 3500 [d]). As the only evidence against the defendant was the testimony of a single witness, the failure of the government to comply with the "Jencks Act" required dismissal of the charges.

The trial judge ordered production of the "statements" and the government did not argue that the documents were not producible under the "Jencks Act" so there is no issue as to their status as "statements". The ruling by the trial judge was undoubtedly correct as the "statements" sought are complete in that they cover every issue about which the agents wanted to know. They were taken down long hand so are unques-

tionably not verbatim, but due to their all inclusive content are "substantially verbatim", if the inclusion of that term in the statute is to have any meaning. "The statute was meant to encompass more than mere automatic reproductions of oral statements" but the exact content of a discoverable statement has not been defined, the determination being left to the sound discretion of the trial judge (Palermo v. United States, 360 US 343 [1959]). Here, the trial judge ordered production and upon the government's failure to produce should have imposed sanctions.

The only evidence against defendant is the testimony of the recollection of a single witness as to what happened in defendant's office. If in fact the witnesses had no recollection of any facts surrounding his marriage until those facts were supplied by an

examination of documents and agent reports there would be a reasonable doubt as to their purported precise recall of events in defendant's office, events which were denied by defendant and his paralegal. Without a recitation by the witness of those events, there is no evidence that defendant had any knowledge of the fraudulent nature of the marriages, if in fact they were fraudulent.

The INS rules requiring agents to retain their original notes were formulated to implement the requirements of the "Jencks Act". The agents acted in bad faith when they deliberately destroyed the "statements" in violation of those rules. The courts must enforce those rules (United States v. Caceres 440 US 741 [1979]), and sanctions must be imposed for their deliberate violation.

Here the Court of Appeals held that agents need not preserve handwritten notes if they incorporate them into formal reports. There was no consideration by the Court of Appeals (or trial court) of whether the notes were "statements" under 18 USC 3500(e)(2), only an assumption by the Court of Appeals that they were the basis of a "statement" under 18 USC 3500(e)(1). As the agents did not testify, and there is no indication that the witnesses who did testify "adopted or approved" the reports, only that they used them to study for trial, the reports were not "statements" of the witness. There is no indication that the "reports" accurately reflect what was in the "statements", and the examples (cited above) of De Sousa and Rufus clearly indicate that they do not.

The routine destruction of the

"statements" of witnesses by the government and its concomitant failure to produce them when ordered to do so by the trial judge violates the defendant's rights under the Fifth (Arizona v. Youngblood, __US__, 57 LW 4013 [1988]) and Sixth Amendments and the "Jencks Act". The sanction of striking the witness' testimony should have been imposed in each instance. The failure to do so requires reversal.

The trial judge ordered the government to produce and turn over as Brady (Brady v. Maryland, 373 US 83 [1963]) material, all statements of Patricia Parris, an arranger, which mentioned Denise Oliver, another arranger, and the prosecutor ~~responded~~, "I will copy the Grand Jury minutes for Ms. Parris, if there are any, and whatever investigative reports we have on her interview" (8). Two statements and a

photographic identification of a Haitian were produced (A428, 464, 471). In the first interview, Ms. Parris was asked, "Did you see Dee Dee (Oliver) since we talked to you?" (A469). There is an earlier statement which was not turned over[12].

The statements of Patricia Parris are particularly important to the defendant as she, together with Oliver, was alleged to have arranged the Parris and Beechum marriages. About the lawyer, unnamed, she told the government:

> "I never spoke to this lawyer. I've seen him he's a tall guy. I only saw him once. I was

---

12. In response to defendant's argument that there is such a statement, the government simply argues that it "agreed to give the defense all of the reports it had relating to interviews of Parris" (brief on appeal, p. 27), not that it did so.

What the government agreed to produce is immaterial, the trial court ordered production of certain statements and the government did not produce them.

> with Dee Dee (Oliver) and Theresia (Rufus)" (A469).

The defendant is a "sixfooter", not overly tall. He does possess one feature that stands out and is normally used to describe him, red hair (see: Hayes p.671). Only three other purported descriptions of defendant were set forth in agents reports, none a conviction count, "grey/blond" (White, A461), "5'10", white" (Butler, A382), and "tall, medium build, with salty brown hair" (Oliver, A421), none accurately describing the defendant's hair.

The description, or lack thereof is more significant when considered with the fact that Ms. Parris' cousin, Theresia Rufus, could not remember what the attorney looked like and could not identify him in the courtroom (379).

The defendant asked for, in a general request, all Brady materials.

None was produced. Sometime after trial while examining the originals of documents, the defendant discovered a statement by Ms. Parris' other cousin, Janice Rufus, which stated that Ms. Parris arranged her marriage but that she was not the person who went to the attorney's office and somebody else must have used her name (A472)[13]. That statement, when considered with the other evidence, clearly indicates the "scam" perpetrated against defendant and the government. Had defendant been aware of the contents of that statement, the defense and the

---

13. Janice Rufus was mentioned in the search warrant but her marriage was not an indictment count, indicating that the government was well aware of the fact that in at least some of the cases the persons for whom Patricia Parris allegedly arranged marriages and for whom the defendant filed documents, were not the same person at the time of marriage and at the time of interview in the defendant's office.

outcome of the trial would probably have been different.

In his post-conviction motion, defendant set forth the analysis of Paul Osborn, an examiner of questioned documents, that in 10 of the 26 substantive counts, the person who signed the documents in defendant's office was not theperson who signed the marriage license or certain documents for the government (A 265). Due to a lack of sufficient exemplars, the expert could make no determination in a number of cases, including the conviction counts.

There is a substantial question as to whether the witnesses ever saw defendant and whether they were ever in his office. While the trial judge felt defendant knew who was in his office (A 273), defendant had interviewed about 2,000 people over the three year period in question (SA 61) and could not remem-

ber everyone. The practice of the office was for the defendant to interview both spouses for a short time, related as about 20 minutes (SA 59) on the first visit and then for the alien to return to the office a number of times, most often seeing the paralegal (SA 59), but only in a small number of cases for the citizen to return (SA 60). The short encounter with the citizen meant that in most instances the citizen could only be identified through his spouse who was known, not because he was known. The defendant did not know the witnesses against him, only their names as persons married to an alien client (see: Arizona v. Youngblood, supra, Blackmun dissenting, ftnte 8).

Ms. Parris and three of the persons (the only ones, according to the agents' reports, who were asked) for whom she allegedly arranged marriages

failed to accurately describe defendant. As the Beechum and Parris marriages were also arranged by her, it is reasonable to assume that they would also be unable to describe defendant. If the persons who testified against defendant were not in his office or did not see him, as indicated by the Janice Rufus statement, there could be no conviction. Any information contained in statements by Ms. Parris and Ms. Rufus which would so indicate would be exculpatory under Brady and there is a "reasonable probability that, had the evidence been produced to the defense, the result of the proceeding would have been different" (United States v. Bagley, 373 US 667 [1985]). The failure to produce the Patricia Parris and Janice Rufus statements deprived defendant of a fair trial, and deprived him of due process.

Violations by the government of

Brady and the "Jencks Act" require reversal and dismissal of the indictment.

CUMMULATIVE ERROR REQUIRES REVERSAL

If the uncorroborated testimony of a single witness is sufficient to sustain a conviction, it is of the weakest possible nature. Under those circumstances, cummulative error requires reversal. (United States v. Wallace, 848 F2d 1464 [9 Cir 1988]; United States v. Berry, 627, F2d 193 [9 Cir 1980], cert den 449 US 1113).

On the direct examination of each of the prosecution witnesses, the prosecutor elicited not only the fact that he had an agreement with the government (United States v. Edwards, 631 F2d 1049 [2 Cir 1980]), but also that he would not be prosecuted if he "told the truth" (A111) and that he agreed "to tell the truth" (A43, A77), all before an

issue of credibility was raised. Such bostering was improper (United States v. Borello, 766 F2d 46 [2 Cir 1985]; United States v. Jones, 763 F2d 518 [2 Cir 1985], cert den 474 US 981).

A defendant in a criminal case has an absolute statutory right to appeal (Coppedge v. United States, 369 US 438 [1962]).

The facts upon which the decision of the Court of Appeals was based are in substantial part erroneously stated. It is stated that the defendant "contends that the uncorroborated testimony of accomplices such as Cureton and Parris was insufficient to support the verdict" (United States v. Elusma, 849 F2d 76, 79 [2Cir 1988]). Cureton was an arranger as was Patricia Parris (who did not testify, and to whom obvious reference is made). Cureton testified that the couples were taken to defendant

because he was "cheap" (A 177). She did not testify as to whether or not the couples in question lived together after their marriages or to being present at their interviews with defendant. Her testimony and lack of testimony, on certain issues, support defendant. It is not her testimony about which defendant complains.

It is the testimony of the three citizen spouses about which defendant complains, not the arrangers. It is based solely upon the uncorroborated testimony of a single citizen spouse that defendant was convicted.

The Court of Appeals held that agents "need not preserve such notes ("Jencks Act" "statements") if the agents incorporate them into formal reports, which they did here on the day the interviews took place". There are four reports in question. Two are

undated and unsigned and two are dated and signed the next day (A 367, A364, A431, A457).

The Court of Appeals found that the trial judge found "no violaton of the Brady rule or Section 3500", a finding not made by the trial court. When the defendant later tried to raise the issue in the trial court, the trial judge found that the Court of Appeals had decided the issue (SSA 14). The defendant has been denied any consideration of the issue though he is entitled to same.

The cummulative error set forth in the within petition requires reversal (United States v. Wallace, supra).

> "While every criminal conviction is important to the defendant, there is a special poignancy and a corresponding responsibility on reviewing judges when, as here, the defendants have been men of blameless lives and respected members of a learned profes-

sion" (United States v. Simon, 425 F2d 796 [2 Cir 1970], cert den 397 US 1006)

CONCLUSION

It is respectfully submitted that the instant petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted, for the reasons set forth herein.

Respectfully submitted

Janet Cunard
Morosco and Cunard
Attorneys for Petitioner
99 Court Street
White Plains, New York 10601
914 997 9606

Dated: White Plains, New York
January 4, 1989